H. B. WEBB

IBLA 77-312 Decided May 1, 1978

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring mining claims null and void.

Affirmed.

1. Mining Claims: Generally -- Secretary of the Interior

   The Secretary of the Interior is charged with seeing that valid mining claims are recognized, invalid ones eliminated, and the rights of the public preserved.

2. Mining Claims: Generally -- Mining Claims: Determination of Validity

   A mining claimant must comply both with Federal law and with such state requirements as are not inconsistent with federal mining provisions.

3. Mining Claims: Generally -- Mining Claims: Assessment Work -- Mining Claims: Possessory Right -- Mining Claims: Recordation

   In order for a mining claimant to maintain a possessory right in a claim under Arizona law, the locator must file within 90 days a copy of the location notice in the county in which the claim is located.

4. Mining Claims: Generally -- Mining Claims: Assessment Work

   The United States and a city which has filed an application to purchase land

pursuant to the Recreation and Public Purposes Act are adverse claimants who may take advantage of the failure of a mining claimant to perform annual assessment.

5. Mining Claims: Generally -- Segregation: Generally

A classification of the lands under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1970), as amended, segregates the land from all other forms of appropriation under the public land laws including the mining laws when the classification is noted on the Bureau of Land Management State Office records.

6. Administrative Procedure: Hearings -- Constitutional Law: Generally -- Constitutional Law: Due Process -- Mining Claims: Hearings -- Notice: Generally -- Rules of Practice: Hearings

In some cases due process requires not that a person have notice and a prior hearing before a deprivation of property, but that an individual be given notice and an opportunity for a hearing before the deprivation of property becomes final.

7. Administrative Procedure: Hearings -- Mining Claims: Hearings -- Rules of Practice: Hearings

In proceedings before the Department to determine the validity of a mining claim, notice and an opportunity for a hearing is required only where there is a disputed question of fact; where the validity of a claim turns on the legal effect to be given facts of record concerning the status of the land when the claim was located, no hearing is required.

8. Mining Claims: Generally -- Mining Claims: Abandonment
Under Arizona law a failure to perform the tasks enunciated in 27 ARS 203 within the specified time will be deemed to be an abandonment of a mining claim.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

This is an appeal from the October 5, 1976, decision of the Arizona State Office, Bureau of Land Management (BLM), declaring Turkey Track #5 and #6 mining claims null and void.

The Turkey Track #5 and #6 mining claims are situated in the northwest quarter of Sec. 22, T. 4 N., R. 3 E., in the Winifred Mining District in Maricopa County, State of Arizona. 1/

On August 27, 1976, Notice of Mining Location of Lode Claims for Turkey Track #5 and #6 were recorded in Docket 11829 pages 1239-40 and 1237-38, respectively. It is asserted the claims were located and the ground posted on October 4, 1958, by E. G. York in behalf of H. B. Webb. No record of annual assessment work was found in the official records of Maricopa County.

On July 20, 1971, petition application A-6390 was filed under authority of the Act of June 14, 1926, amended, the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1970), by the City of Phoenix for purchase of all unpatented lands in secs. 21, 22, and 27, T. 4 N., R. 3 E., GSR Meridian, Arizona, to be used for park purposes. On February 21, 1973, a proposed classification decision was issued favorably classifying the lands as proper for lease or sale under the provisions of the Recreation and Public Purposes Act.

1/ Turkey Track #5 is situated and located in the Winifred Mining District in Maricopa County, in the State of Arizona, about 1,500 feet in a southeasterly direction from the northwest corner of section 22, T. 4 N., R. 3 E. It lies to the South of Leo #4 claim and to the North of Turkey Track #3 with Turkey Track #4 to the West and Turkey Track #6 to the East. Turkey Track #6 is situated and located in the Winifred Mining District in Maricopa County, in the State of Arizona, about 1,550 feet in a southeasterly direction from the NW corner of section 22, T. 4 N., R. 3 E. It lies to the South of Leo #3 claim, with Turkey Track #5 to the West.

A classification decision was issued on April 26, 1973, classifying all unpatented lands in secs. 21, 22, and 27, T. 4 N., R. 3 E., GSR Meridian, Arizona, for disposal under the provisions of the Act of June 14, 1926, as amended. A notice of the proposed sale of the land under the authority of that Act was published in the Arizona Weekly Gazette for 4 consecutive weeks beginning August 21, 1973, and ending September 11, 1973. In accordance with 43 CFR 2741.5, publication is required to allow all persons having a claim to the lands to file notice of the claim with the Bureau of Land Management. In this instance no response to the publication was received.

In its decision the BLM State Office reasoned that between the time appellant located his mining claims on October 4, 1958, as shown by the location notices, and the time appellant recorded the notices on August 27, 1976, an adverse right intervened because of the filing of recreation and public purposes application A-6390 and the subsequent segregation from mineral location on April 26, 1973, by classification in accordance with the Act of June 14, 1926, as amended, along with the notation on the official records of the appropriate office of the BLM, here the Arizona State Office.

The appellant offers three arguments to support the assertion his mining claims should not be declared null and void. The first argument advanced by appellant asserts a failure to comply with the mining laws will not inure to the benefit of a nonmineral claimant, because the meaning of the word "adverse," contemplates only another mineral claimant benefiting from his inaction. Succinctly stated, appellant's second argument is that he was deprived of his mining claims in an unconstitutional manner as the requirements of due process, prior notice and a hearing, were not afforded to him. The third argument states the taking of his mining claims was unconscionable because one, the forfeiture of mining claims is not favored, and two, there has been no abandonment of the mining claims.

[1] The Department of the Interior has plenary authority over the administration of the public lands, including mineral lands, and the Secretary of the Interior has broad authority to issue regulations concerning them. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). The Secretary of the Interior is charged with seeing that valid mining claims are recognized, invalid ones eliminated and the rights of the public preserved. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert. denied 393 U.S. 1066 (1969); Duguid v. Best, 291 F.2d 235 (9th Cir.), cert. denied 372 U.S. 906 (1962).

[2] The right to a mining claim rests upon the laws of the United States and upon the laws of the state in which the claim is situated. Belk v. Meagher, 104 U.S. 279 (1881); Johnson v.

McLaughlin, 1 Ariz. 493, 4 P. 130 (1884). A mining claimant must comply not only with Federal law but also with such state location requirements as are not inconsistent with federal mining provisions. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975).

[3] Requirements for locating and maintaining possessory rights in mining claims are set forth at 30 U.S.C. § 28 (1970); specifically, the requirements for recordation and annual assessment work are enunciated. The Secretary has promulgated regulations to implement the mining laws, and in relevant part 43 CFR 3831.1 states:

> Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of minerals, by locating the lands upon which such discovery has been made. A location is made by (a) staking the corners of the claim * * * (b) posting notice of location thereon, and (c) complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims.

The requirement for recordation is set forth at 27 ARS 203 which states in relevant part:

> A. The locator of a lode claim shall:
>
> 1. Cause to be recorded in the office of the county recorder a copy of the location notice within ninety days from the time of the location.
>
> 2. Monument the claim on the ground within ninety days from the time of the location so that its boundaries can be readily traced.
>
> B. The locator of a lode claim shall within one hundred twenty days from the time of the location sink a location shaft on the claim * * *.
>
> C. In lieu of the requirements of subdivision B hereof, the locator of a lode claim, within one hundred and twenty days from the time of location may:
>
> 1. Do location work consisting of drilling not less than ten feet in depth in any one

> hole, costing at least one hundred dollars for the actual doing of such drilling at the point where done * * *.
>
> * * * * * * *
>
> 3. Make and record in the office of the county recorder of the county in which the claim or claims are located, an affidavit by the person on whose behalf such drilling was done or by some person for him knowing the facts, * * *.
>
> D. Failure to do all the things within the times and at the places specified in subsections A and B or C shall be an abandonment of the claim, and all right and claim of the discoverer and locator shall be forfeited. [Emphasis supplied.]

Satisfaction of the federal regulations require that not less than $100 worth of labor must be performed or improvements made thereon annually. The period within which the work is required to be done commences at 12 o'clock meridian on September 1 succeeding the date of location of each claim. 43 CFR 3851.1.

The recordation of an affidavit of annual assessment work under Arizona State law is set forth in 27 ARS 208 which states in relevant part:

> A. Within three months after expiration of the time provided for performance of annual labor or making improvements upon a mining claim, the person on whose behalf such work or improvement was made, or some person for him knowing the facts, may make and record in the office of the county recorder of the county in which the claim is located an affidavit * * *.
>
> B. The affidavit when recorded shall be prima facie evidence of the performance of the labor or improvements * * *.

To summarize, Arizona law allows a locator of a mining claim 90 days time within which the locator must have a copy of the location notice become a part of the official records of the county in which the claim is situated, after which time the claim is deemed abandoned and rights in the claim are forfeited. Neither Federal nor Arizona law requires recordation of an affidavit of assessment work. However, under Arizona law it is advantageous to do so, as

an affidavit filed within 3 months of the end of an assessment year is prima facie evidence of the facts stated in the affidavit. In this instance neither Federal nor Arizona law has been complied with.

In his statement of reasons, appellant acknowledges that under Arizona and consequently Federal law a failure to timely record a location notice renders the location invalid with respect to adverse rights acquired before the filing. Pearley v. Goar, 195 P. 532 (Ariz. 1921). Appellant, however, denies that either the United States or the City of Phoenix has "adverse rights" in the present case. Rather, appellant contends that only a subsequent mineral locator may possess such adverse rights and compel forfeiture.

Appellant's assertion runs counter to the Department of the Interior's interpretation of Pearly v. Goar, supra. In City of Phoenix, 53 I.D. 245, 247 (1931), the Assistant Secretary held on facts virtually identical to those of the instant case that the City of Phoenix had acquired adverse rights as the grantee of lands withdrawn for public park purposes.

It is noteworthy that City of Phoenix distinguishes the case where a locator has failed to record from that where forfeiture occurs because a locator has failed to perform annual assessment work. As to the latter instance, the Assistant Secretary followed the then prevailing rule that neither the United States nor a monmineral claimant could enforce the forfeiture of the location. Id. at 248. The Assistant Secretary recognized that both the policies and statutory language controlling forfeiture on failure to do annual assessment work distinguished that issue from forfeiture under the Arizona recording statute.

Appellant has not asked us to overrule City of Phoenix. He has instead drawn our attention to authority concerning failure to perform annual assessment work. This authority does not persuade us to change the rule of City of Phoenix. As we are even convinced that recent developments undermine the traditional rule that the United States has no power to compel forfeiture for failure to perform annual assessment work, we follow City of Phoenix with respect to forfeiture for failure to record.

The traditional rule finds its strongest statement in a series of Supreme Court cases dealing with the validity of oil shale locations following the passage of the Mineral Lands Leasing Act of 1920, which provided that oil shale be available only on a lease basis. The Act of 1920 contained a savings clause that preserved the validity of locations acquired prior to the passage of the Act

and maintained in compliance with the laws under which initiated. On the question of whether failure to perform annual assessment work placed a claim outside of the savings clause and therefore subject to leasing by the United States, the Supreme Court held in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, 645 (1935):

> Under § 2324 of the Revised Statutes (30 U.S.C. 28), the owner is required to peform labor of the value of $100 annually, but a failure to do so does not ipso facto forfeit his claim, but only renders it subject to loss by relocation. * * * Thus, prior to the passage of the Leasing Act of 1920, the annual performance of labor "was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted." Wilbur v. Krushnic, * * * [280 U.S. 306 (1930).]

More recently, however, the Supreme Court has recognized that the United States has an interest in eliminating mining locations failing to comply with applicable law. As appellant concedes, the doctrine of Krushnic and Virginia-Colorado has been severely limited by Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). The Court stated at 57:

> Unlike the claims in Krushnic and Virginia-Colorado, the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that Krushnic and Virginia-Colorado control this litigation. We disagree with the dicta in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work.

As the dissenting opinion in Oil Shale Corp. suggests, 2/ the ramifications of that decision range far beyond the narrow circumstances considered and may effectively overrule the two previous cases. One can easily infer that the United States is, on behalf of the public interest, the "beneficiary of invalid claims" in many contexts, and should have the power to cancel noncomplying claims and dispose of the land embracing them. The Department of the Interior appears to have taken this broad interpretation in enacting 43 CFR 3851.3(a), which provides:

> Failure of a mining claimant to comply substantially with the requirement of an annual expenditure of $100 in labor or improvements on a claim imposed by section 2324 of the Revised Statutes (30 U.S.C. 28) will render the claim subject to cancellation.

In sum, we feel that a clear trend favors granting the United States increased power to eliminate claims failing to comply with the law. We therefore follow the holding of City of Phoenix, supra, that the United States and its grantees hold adverse rights against a claimant who has failed to record under the Arizona statute.

In the present case, since appellant failed to record pursuant to the Arizona statute until more than 3 years after the land in question was withdrawn from mining entry, BLM properly declared the locations null and void.

[5] The lands in question were not available for mining at the time appellant filed his notice of location because a classification of lands under 43 U.S.C. § 869 (1970), as amended, segregates the land from all other forms of appropriation and entry under the public land laws including the mining laws when the classification is noted on the State Office records. R. C. Buch, 75 I.D. 140 (1968), aff'd Buch v. Morton, 449 F.2d 600 (1971); Henri Guzek, 5 IBLA 133 (1972); Gerald D. Heden, 6 IBLA 291 (1972). The Petition classification A-6390 was filed on July 29, 1971, for purchase of all unpatented lands in secs. 21, 22, and 27, T. 4 N., R. 3 E., GSR Meridian, Arizona. On February 21, 1973, a proposed classification decision was issued classifying the lands for lease or sale under 43 U.S.C. § 869 (1970), as amended, and finally on April 26, 1973, the lands were classified for disposal in accordance with the provisions of the statute. It was on April 26, 1973, more than 3 years before a notice of mining location was filed, that the lands were segregated from all other forms of appropriation, including the mining law. Hence, appellant's location is null and void.

2/ Hickel v. Oil Shale Corp., supra at 61, 94 S. Ct. at 203. (Burger, Ch. J., dissenting).

[6] Next appellant complains the BLM has dispensed with a "formal contest proceeding" which he believes he was entitled to under the Fifth Amendment requirement of due processs, which contemplates notice and a hearing prior to a deprivation of property. Appellant asserts without notice and an opportunity for a hearing the BLM decision is unconstitutional and their decision is null and void. We disagree.

In support of his argument the appellant cites Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1919), and Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 (1972). These two cases required notice and a prior hearing before a deprivation of property could be effected. In the case of Sniadach, supra, it was pre-judgment garnishment of wages, and in Fuentes, supra, it was pre-judgment replevin of goods. The Supreme Court in Fuentes was emphatic these cases were not limited to their facts, as had been thought by some state courts after Sniadach, but applied what they termed a "most basic due process requirement" to all property interests except in "extraordinary situations." The Court elaborated upon these "extraordinary situations" at 407 U.S. 90-93, 92 S. Ct. at 1999, 1920. The division of opinion on the effect of these cases and the disruption of heretofore established practice, particularly in the area of creditor's rights, stirred lawyers and the commercial community for well nigh 2 years.

Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), a case appellant apparently overlooked, however, severely limited the decision in Fuentes, and in fact Mr. Justice Powell reads W. T. Grant Co. as overruling Fuentes. 3/ W. T. Grant Co. holds that due process does not require notice and a prior hearing in every case that an individual is deprived of property. Instead, the Court approves in most instances the pre-Sniadach rule that: "[W]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." W. T. Grant Co., supra at 611, 94 S. Ct. at 1902, Sniadach and Fuentes are thereby limited to special situtations in which pre-hearing deprivation would be oppressive or manifestly unfair. With respect to Federal administrative procedure the Court in W. T. Grant Co., supra at 612, 94 S. Ct. at 1902, cites with approval Ewing v. Mytinger & Casselberry, 339 U.S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950). There the Court found no violation of due process where the Food and Drug Administration seized a shipment

3/ W. T. Grant Co., supra at 623, 94 S. Ct. at 1908 (Powell, J., concurring).

of allegedly misbranded but nondangerous nutritional supplements without prior notice or hearing. The Court ruled that FDA's acts were constitutional, because "so long as the requisite hearing is held before the final administrative order becomes effective." The Department of the Interior's practices here comport well the Court's formula.

Furthermore, we believe that even if due process did require the Department of the Interior to afford appellant some form of hearing prior to declaring the mineral location null and void, that requirement is satisfied in the present case by this appeal, without the initiation of contest proceedings. It has consistently been held that where, as here, there are no disputed questions of fact and the validity of a claim turns on the legal effect to be given facts of record which show the status of the land when the claim is located, no hearing before an administrative law judge is required. United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432 at 453 (9th Cir. 1971); Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966), aff'g The Dredge Corp., 64 I.D. 368 (1957); 65 I.D. 336 (1958); Roy R. Cummins, 26 IBLA 223 (1976); David Loring Gamble, 26 IBLA 249 (1976). As explicated by Mitchell v. W. T. Grant, supra at 614 et seq., the constitutionality of a hearing procedure must be judged within the context of the issues to be considered and the impact of the property deprivation on the individual. Here the issues are fully developed by the record before us and a hearing would add nothing to the resolution of the case. More elaborate procedure therefore seems unwarranted.

Appellant's final contentions – that forfeitures are not favored by the law and that there has been no abandonment in the present case – do not aid his cause. The record clearly indicates that appellant's locations are void under the Arizona statute. Even if appellant had diligently worked the claims and expended large sums of money to develop them, his claims would not be valid. In fact, the record does not disclose any evidence that appellant has so worked the claims, and such a failure would justify forfeiture independently of the Arizona statute. Similarly, it does not avail appellant that he did not abandon his claims in the more general sense of the word. His claims are void under the Arizona statute whether he intended to abandon them or not.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judge.